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No. 07-88

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*In the Supreme Court of the United States*

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CITY OF MODESTO, *ET AL.*,
*Petitioners,*

v.

ENRIQUE SANCHEZ, EMMA PINEDO, AND SALVADOR VERA,
*Respondents.*

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*ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIFTH APPELLATE DISTRICT*

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# REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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## REASONS FOR GRANTING THE WRIT

The Petition seeks reversal of the decision below applying rational basis review, instead of the constitutionally required strict scrutiny review, to the racial classifications that determine liability under the California Voting Rights Act ("Act"). Specifically, California Elections Code Section 14028(a) mandates invalidation of at-large elections entirely and solely on the basis of race, i.e., racially polarized voting, without requiring proof of racial injury before imposing liability. This statute, which unfairly threatens thousands of at-large election systems in California that cause no impairment of voting rights, is facially unconstitutional.

Respondents' Brief in Opposition barely responds to the pivotal standard of review issue or to the authorities cited in the Petition mandating strict scrutiny review of the Act's express racial classifications. Respondents merely repeat the erroneous holding of the decision below that the Act is a race-conscious statute that is race neutral and applies to all races equally, thereby deserving only rational basis review. Yet, as noted in the Petition (pp. 5-9), this Court plainly has rejected that rationale in analyzing express racial classifications like those here. Respondents raise ripeness, deference, the propriety of facial review and mootness but the decision below, in failing to apply strict scrutiny to the Act's racial classifications, is unquestionably wrong, inescapably conflicts with this Court's settled jurisprudence and warrants plenary review and reversal.

Respondents also attempt to sidestep the Act's glaring facial constitutional defect, i.e., it mandates invalidation of at-large systems solely on the basis of race without proof of racial injury. They assert that courts applying the Act "must" determine that an effective remedy exists after liability has been determined. Opp., p. 3. Yet it is precisely because remedies are not considered before liability is imposed (as is

true under federal law) that the Act is facially invalid as a matter of settled constitutional law. Pet., p. 15. Respondents do not appreciate that invalidation of the at-large system solely on the basis of race is itself race-based governmental action, one imposed unconstitutionally without proof of racial injury. The Act in short cannot be fairly characterized as an antidiscrimination statute. Indeed, it was enacted for racial balancing objectives. Pet., p. 21.

At bottom, the facial constitutional issue presented is whether racially polarized voting without proof of a majority district constitutes vote dilution or discrimination, i.e., whether "influence" claims are viable. Pet., pp. 14-19. This is an issue of national importance frequently asserted in federal voting rights cases that compels strict scrutiny review. The Legislature failed to make the constitutionally required findings on that issue and the decision below erroneously avoided that issue by applying an improper rational basis standard of review. The Act cannot survive strict scrutiny review.

The Petition should be granted.

## I. THE OPINION BELOW IS DIRECTLY IN CONFLICT WITH THIS COURT'S CASES

Respondents erroneously assert that "there is no conflict in the law" (Opp., p. 1) and that Petitioners do not purport to articulate any conflict in authority to warrant review of the Act (Opp., p. 7). Nothing could be further from the truth. As the Petition makes clear (pp. 9-12), the failure of the Court of Appeal to apply strict scrutiny to the racial classifications that determine liability under the Act is directly contrary to this Court's Fourteenth Amendment strict scrutiny racial classification cases.

On its face, the Act invalidates at-large elections entirely and only on the basis of racially polarized voting, an express racial classification that requires strict scrutiny review. The opinion below, in applying deferential rational basis review to Petitioners' facial challenge to the Act, is contrary to the Fourteenth Amendment. It does not matter that no other California court has addressed the Act or that no other state has enacted a similar statute. What matters is that the opinion below, which will govern application of the Act to several thousand public entities in California that elect at-large, is in conflict with this Court's cases.

Respondents' treatment of the Act's racial classifications is perfunctory, largely nonresponsive to the Petition and mischaracterizes important cases of this Court. In particular, respondents confuse race-conscious statutes with statutes containing express racial classifications. Respondents (Oppos., p. 14) cite *Bush v. Vera*, 517 U.S. 952, 958 (1996) for the proposition that strict scrutiny does not apply simply because redistricting is performed with consciousness of race. *Bush*, however, involved redistricting legislation that did not even mention race and thus was not a facial challenge to an express racial classification as *Bush* itself makes clear. *Id.* Nonetheless, the Court, in reviewing the Legislature's actions and motivations in *Bush*, made clear that, while race could be considered as one of many factors, if race were the sole or predominant criterion to which all other relevant factors were subordinated, strict scrutiny would apply. *Id.* at 959. In this case, the Act contains explicit racial classifications that require invalidation of at-large elections solely on the basis of race without regard to any other factors. Pet., pp. 6-9. Strict scrutiny is thus mandated by this Court's precedents. Labeling the Act "race

conscious" provides no escape from that conclusion.[1] Indeed, this Court applied strict scrutiny to the University of Michigan's "race-conscious" admissions policy, which explicitly authorized consideration of race as one of many factors. *Grutter v. Bollinger*, 539 U.S. 306, 341-42 (2003). *See also Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S.__, 127 S. Ct. 2738, 2753-54 (2007) and *id.* at 2792, 2794-96 (Kennedy J., concurring) (comparing race-conscious measures that do not rely on express racial classifications).

Respondents erroneously argue that strict scrutiny does not apply because the Act applies to all races and does not burden or benefit one race over another. This Court's cases squarely reject that contention. Pet., pp. 9-10. Respondents completely fail to address or distinguish this Court's repeated holdings that neutral racial classifications that apply to all races equally nonetheless receive strict scrutiny. *Id.* Respondents fail to appreciate that racial classifications inherently are harmful. *Id.*, p. 9. The Act in any event distributes burdens and benefits solely on account of race. *Id.*, p. 8.

Respondents never respond directly to the Act's primary constitutional defect, i.e., it is facially unconstitutional because it mandates liability solely on the basis of racially polarized voting, without requiring proof of racial injury or minority electoral defeat. Pet., pp. 13-23.

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[1] Curiously, respondents suggest that it was Petitioners who asserted that the Act here is "race-conscious." Opp., p. 4. That assertion is factually untrue and respondents provide no citation to the record to support it. It was respondents who in the courts below argued that the Act was merely "race-conscious" and should receive rational basis review for that reason. Petitioners then and now have argued consistently that the Act is not merely race-conscious but an express racial classification.

Respondents assert that the Act "offers a remedy when racially polarized voting impairs" a group's ability to elect (Opp., p. 1) but quite plainly the statute does not require proof of anything more than racially polarized voting to establish liability, which by itself does not demonstrate vote dilution or racial injury, as respondents themselves concede. *See* Opp., p. 9 ("in some circumstances, racially-polarized voting in at-large elections improperly impairs the rights of members of a protected class to vote") (emphasis added).

The decision below nowhere holds that petitioners misinterpreted it (Opp., p. 1) and respondents do not provide any citation to support that assertion. It is Section 14028(a) that is extreme, not petitioners' interpretation of it. Opp., p. 18.

Respondents assert that the Legislature concluded that racially polarized voting is one way voting rights can be impaired (Opp., p. 1) but the Legislature failed to provide the constitutionally required findings to justify that conclusion in all circumstances, plainly rendering the Act facially unconstitutional. *See* Pet., pp. 19-23. Respondents assert that the Act seeks to remedy a "recognized harm," and to redress a "race-based harm, vote dilution" (Opp., p. 16) but liability without proof of a majority district or minority electoral defeat is not a recognized harm or vote dilution or racial injury. Pet., pp. 13-19. Fatally, the Legislature made no findings to establish that racially polarized voting in the absence of a majority district causes racial injury that could be regarded as compelling for strict scrutiny purposes. Pet., pp. 19-23.

This is not a case about remedies but about liability. Remedies considered after liability is imposed (i.e., after the at-large system has been condemned) cannot cure the Act's constitutional infirmity. The Act mandates invalidation of at-

large election systems solely on the basis of racially polarized voting. Because remedies are not considered before liability is imposed, the Act cannot credibly be considered an antidiscrimination measure and the decision below errs in so characterizing it. Pet., p. 11. It is precisely what the Legislature intended, and the legislature history makes clear it is. It is racial balancing legislation. Pet., p. 21. Respondents invoke other civil rights laws but these laws do not impose liability solely on the basis of race without proof of racial injury.

## II. THIS CASE IS RIPE FOR REVIEW

Respondents seek to avoid review by arguing that California courts have not construed the Act yet or determined the elements of liability. The Act, however, plainly mandates the invalidation of at-large election systems on proof of racially polarized voting alone. Elections Code Section 14028(a). The opinion below does not invalidate or modify that statutory provision nor may the trial court on remand do so. Quite to the contrary, the opinion below retains the Act's challenged racial classifications. The facial challenge before the Court is squarely and timely presented. This is not an interlocutory appeal, nor does the remand order provide any basis to defer needed review of the Act's facial constitutionality.

In any event, the opinion below erroneously applying rational basis review to the Act's racial classifications is ripe for review, and respondents do not suggest otherwise. More importantly, the trial court on remand necessarily will carry out the Court of Appeal's instructions based on its erroneous rational basis standard. The Act's racial classifications, however, are inherently suspect, presumptively unconstitutional and subject to immediate strict scrutiny review. Pet., p. 7. Respondents are entitled to have

California justify its racial classifications under strict scrutiny before they are applied. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 224 (1995) ("any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny").

## III. STATE RACIAL CLASSIFICATIONS RECEIVE NO DEFERENCE IN STRICT SCRUTINY REVIEW

Respondents suggest that deference is due to a state's regulation of elections and its construction of statutes. This Court's strict scrutiny cases, however, make clear that no deference is afforded to explicit state racial classifications:

> "Section 1 of the Fourteenth Amendment is an explicit *constraint* on state power, and the States must undertake any remedial efforts in accordance with that provision. To hold otherwise would be to cede control over the content of the Equal Protection Clause to the 50 state legislatures ... We believe that such a result would be contrary to the intentions of the Framers of the Fourteenth Amendment, who desired to place clear limits on the States' use of race as a criterion for legislative action, and to have the federal courts enforce those limitations."

*City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 490-91 (1989); *see also Miller v. Johnson*, 515 U.S. 900, 922 (1995) ("When a state governmental entity seeks to justify race-based remedies to cure the effects of past discrimination, we do not accept the government's mere assertion that the remedial action is required. Rather, we insist on a strong basis in evidence of the harm being remedied.").

Respondents are badly mistaken in characterizing this case as only a matter of state and local interest. Opp., p. 12. Elections and voting remain the province of state and local authorities unless and until they enact racial classifications that transgress the Fourteenth Amendment. Supreme Court review then becomes imperative.

Nor is it true that this case is limited to California. Opp., p. 12. If the decision below affording rational basis review to racial classifications were to stand, similarly fashioned race-based legislation in other states can be employed without proof of racial injury, need or justification. The direct conflict between the decision below and this Court's racial classification precedents is therefore a matter of national importance that warrants this Court's review.

## IV. *SALERNO* IS INAPPLICABLE

Respondents erroneously suggest that review is not warranted because of possible constitutional concerns in its application, invoking *United States v. Salerno*, 481 U.S. 739 (1987). Opp., pp. 18-19. Yet the Act here is invalid on its face in all applications. *Salerno* is simply inapplicable.

Facial challenges are directed to the challenged statutory language. Petitioners assert that Section 14028(a), invalidating at-large election systems on proof of racially polarized voting alone without proof of a majority district, electoral defeat or racial injury, is unconstitutional on its face. That statute as written is invalid and thus cannot be applied to anyone. Respondents have not carried their burden to demonstrate that the statute has any conceivable valid application as written, nor can we conceive of one.

Petitioners are entitled to have Modesto's at-large election system adjudicated according to a valid rule of law, one that does not offend the Constitution. *See commentaries,*

*e.g.*, Isserles, *Article: Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement*, 48 Am. U. L. Rev. 359, 363-64 (1998); Dorf, *Federal Challenges to State and Federal Statutes*, 46 Stan. L. Rev. 235, 238 (1994). Thus, in *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966), this Court invalidated a poll tax on voting without requiring proof that the plaintiffs in that case could not pay it. Rather, the Court invalidated the statute because voter qualifications "have no relation to wealth nor to paying or not paying this or any other tax." *Id.* at 666. The law was declared invalid as to all.

This Court has not applied or even mentioned *Salerno* in strict scrutiny racial classification cases such as *Croson; Adarand; Shaw v. Reno*, 509 U.S. 630 (1993); *Johnson v. California*, 543 U.S. 499 (2005); and *Parents. See Berkley v. United States*, 287 F.3d 1076, 1090 (Fed. Cir. 2002). The reason is that the challenged racial classifications are invalid as drawn without more if they are not narrowly tailored to promote a compelling state interest. That is what Petitioners seek here – invalidation of Section 14028(a) because it lacks findings, it invalidates at-large election systems solely on the basis of racially polarized voting without first requiring proof of racial injury and it was enacted for racial balancing purposes.

*Salerno* presents no bar to review.

## V. THIS CASE IS NOT MOOT

Respondents urge the Court to deny review because the Petitioner City of Modesto has scheduled an advisory vote on district elections for the November, 2007 election. (Opp., p. 13). The vote in November is not binding on the City and obviously does not moot the Petition, whatever the outcome of the election. Nothing requires the City to put a

binding measure on district elections before voters, as the advisory election may fail. Even if a binding vote occurs, there is no certainty that voters would approve it. Modesto is a charter city and the election system can be changed only by approval of the voters. The Petition should not be denied merely because Modesto is exploring what it will do if review is not granted.

The Act is statewide in scope, the constitutional standard of review issue is ripe and properly before the Court and if its facial unconstitutionality is not resolved the Act will threaten all at-large election systems in California.

## CONCLUSION

The Petition should be granted.

Respectfully submitted,

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